IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

FRIDAY, THE 14TH SEPTEMBER 2007 / 23RD BHADRA 1929

AS.No. 367 of 2001(E)

OS.28/1998 of ADL.SUB COURT, THALASSERY
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APPELLANT:
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1. PUTHALON KUNNATH USHA,
D/O.GOVINDAN, TEACHER,
PACHAPOIKA P.O.,
OLAYIKKARA, THALASSERY TALUK,
KANNUR DIST.

2. PUTHALON KUNNATH SURESH,
S/O.GOVINDAN, VETTUMMAL,
P.O.KADIRUR, THALASSERY TALUK,
DIST. KANNUR.

BY ADV. SMT.VIDHYA. A.C
SMT.ARCHANA NARAYANAN

RESPONDENTS:
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1. PUTHALON KUNNATH MANIMALLIKA,
D/O.GOVINDAN, TEACHER, CHEMBILODE AMSOM
CHALA KIZHAKKEKKARA DESOM, P.O.CHEMBILODE,
KANNUR DIST.

2. PUTHALON KUNNATH YESHODA, W/O.GOVINDAN,
CHEMBLONTAVIDA HOUSE, HOUSE NO.3/267,
ERUVATTY AMSOM & DESOM P.O. ERUVATTY,
VIA.KADIRUR, DIST. KANNUR.

3. .DO. SIVADASAN, S/O.GOVINDAN,
.DO. .DO.

4. .DO. RAVINDRAN, S/O.GOVINDAN,
CHANDROTH HOUSE, P.O.MANEKKARA,
PANNIYANNUR AMSOM & DESOM,
THALASSERY TALUK, DT. KANNUR.

5. .DO. SATYANANDAN, S/O.GOVINDAN,
PENSIONER, CHAMBLONTAVIDA HOUSE,
ERUVATTY AMSOM & DESOM, P.O.ERUVATTY,
VIA KADIRUR, THALASSERY TALUK, DIST. KANNUR.

6. .DO. SACHIDANANDAN, S/O.GOVINDAN,
CHAMBLONAVITA HOUSE,
ERUVATTY AMSOM & DESOM.
P.O.ERUVATTY, VIA. KADIRUR,
THALASSERY TALUK, DIST. KANNUR.

R1 BY ADV. SRI.T.A.RAMADASAN
R3&5 BY ADV. SRI.C.P.KUNJHIKANNAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 14/09/2007, THE COURT ON 14/09/2007 DELIVERED THE FOLLOWING:

P.R.RAMAN &
V.K.MOHANAN, J J.

A.S.NO. 367 OF 2001

Dated 14th September, 2007

JUDGMENT

Raman, J.

The defendants 4 and 5 in a suit for partition in O.S.No.28/1998 in the file of the Addl. Subordinate Judge's Court, Thalassery are the appellants herein. Ist respondent herein is the plaintiff and respondents 2 onwards are the co defendants. The plaintiff instituted the suit for partition seeking partition of the plaint schedule property in equal shares and for separate allotment of one share. According to the plaintiff, the plaint schedule properties belonged to one late Govindan Master and on his death his rights devolved to the Ist defendant wife and children - the plaintiff and defendants 2 to 7. Defendants 1 to 3 and 6 and 7 filed a joint written statement. Defendants 4 and 5 filed separate written statement. But their contentions are almost common and identical. According to the defendants, plaint schedule items 1 to 6 belonged to Govindan Master as stated in the

plaint and it is also admitted that plaintiff and defendants are legal heirs of deceased Govindan Master. Govindan Master died intestate. These facts are admitted in the written statement. But according to them, in respect of item No.7 alone there is a dispute. It measures 3 3/4 cents. According to the defendants, predecessor of Govindan Master had only half right over the property and hence, only his half right alone is included for partition. This contention was eventually accepted by the court below against which plaintiff has not appealed against. However, the defendants further contended that on the death of Govindan Master, the legal heirs except the plaintiff, orally partitioned the plaint schedule property through mediators. Share was allotted to the plaintiff also and ever since 1980, the year of partition, the legal heirs of Govindan Master were in possession of the properties allotted to them. Subsequently, in 1991, it was thought desirable to have document and for that purpose a registered partition deed was entered into between the plaintiff and 5th defendant in respect of plaint item No.6. But plaintiff did not join the partition deed and it was registered without the juncture of plaintiff, in 1991.

Similarly, in the year 1997, another partition deed was got prepared, but not executed by the plaintiff. It was signed by other members and got registered in 1997. In item No.6, the 5th defendant has constructed a house of his own, spending money out of his pocket. The construction was so made with the consent of all other parties including the plaintiff. Similarly, the 4th defendant had constructed a house of her own, in item No.3 of the plaint schedule property, in the year 1997. That was also constructed with the knowledge and consent of all the parties. According to them, the Ist defendant has been taking income from the property which was quite sufficient to meet the agricultural operations and other expenses. Though initially the plaintiff also agreed for the partition deed, she did not come to the Registrar's office and had not turned up as promised. In the circumstances, she prayed that since the properties were already partitioned in the year 1980, the suit for partition may be dismissed and in the event of the court finding that a partition is necessary, the properties allotted to the defendants as far as possible may be allotted to them in equity and also that the house in plot

No.3 constructed by the 4th defendant may be allotted to her share without valuing as a reservation. Similarly, the house in plaint schedule item No.6 constructed by the 5th defendant may be allotted to his share without valuing as a reservation.

2. The court raised necessary issues. The evidence consisted of the oral testimony of the plaintiff's husband who was examined as PW-1; the 5th defendant was examined as DW-1; the husband of the 4th defendant as DW-2. Exts.B1 to B16 were marked.

3. On an analysis of the evidence of all the parties the court below found that out of item No.7 only 1 ½ cents and the school building and right of management which are available for partition. The finding on this issue is not under challenge and hence became final.

4. The court while considering the other issues found that the defendants could not satisfactorily discharge their burden to prove that there was an oral partition as set up by them in the written statement. So also, admittedly in none of the partition deed, the plaintiff had joined as a party, as such, partition deed if any between the other co-sharers will not be

binding on him. As regards the building constructed in the property, going by the evidence, it can be seen that the construction so made in the property originally belonged to the co-owners. True, the other co-sharers have agreed to allot the respective plots where the buildings are constructed by defendants 4 and 5 respectively on equity without valuing the property. The court below in issue No.5 held that in the absence of an agreement by all the parties, it cannot be said that defendants 4 and 5 are entitled to get the houses in the properties allotted to their share without valuing. But in equity, the respective houses can be allotted to their shares provided they pay the share of value to the plaintiff. In this regard, the claim of the defendants was that the houses were constructed by them with their own funds and therefore the same be allotted to their share. But they have not produced any accounts and also did not adduce reliable evidence to come to a conclusion that before construction of the respective houses by them, they obtained requisite permission from all the co-owners including the plaintiff. This is the only reason why the court below has declined to accept the contention of

defendants 4 and 5 and allowed the parties allotting the share value of the building also to the plaintiff. The only contention raised in this appeal is against the said finding.

5. Heard the counsel Smt.A.C.Vidya appearing for the appellant and the counsel appearing for the respondents.

6. The definite case of the defendants is that there was an oral partition followed by registration of partition deed between the parties except the plaintiff. Ext.B1 is the registered partition deed entered into between Yesodha and others. The building tax assessment register of the same date is produced as Ext.B2. Exts.B3 to B3(h) are building tax receipts. Exts.B4 to B4(h) are the property tax receipts. Ext.B5 registered partition karar executed in between Yesodha and others, and other building tax receipts and also the extract of the building tax assessment register of local authorities are also produced. On a consideration of these evidence, it can be seen that though in law, the partition between the other co sharers may not bind the plaintiff, it cannot be denied that there was a partition among the other co sharers based on which defendants 4 and 5 were

allotted shares and the building constructed thereon. There is no case for the plaintiff that defendants 4 and 5 were in the management of the entire property either as karanavar or in other capacity. On the other hand, defendants 4 and 5 obtained permission from all the co-sharers except plaintiff and there is also evidence of his continued possession thereafter. There is also evidence to show that house tax, property tax etc. are paid by the concerned defendants. Buildings constructed by defendants 4 and 5 in the respective plots are with their own funds. Except the plaintiff, other sharers have agreed to this. Plaintiff has not produced any evidence to rebut the preponderance of probabilities stated as above. In such circumstances, the finding of the court below that the building as such has to be valued and the plaintiff will be entitled to a share value of the building is not correct. In this connection, we may refer to a decision of this court in **Kassinkunju v. Velayudhan Pillai (1972 KLT 861)** where the question as to whether, if improvements were made by one co-sharer, on a common property, without authorisation from other co-sharers, the claim for compensation by the former is

sustainable, was considered. It was held as follows:

> "The law declines to compel a co-sharer to pay for improvements made on the common property by another co-sharer without the former's authorisation. However, as a matter of equity the court will make every effort to effect the division in such a way by allotting to the co-sharer who made the improvements the portion of the property where the improvements stand so long as this can be done consistently with the proportion of the property to which he is entitled and without causing prejudice to the other co-sharers. But any such equity will become incapable of being worked out in cases where the entire property to be partitioned has been either built upon or otherwise improved. In such cases where one joint tenant or tenant in common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding the fact that they may have added greatly to the value of the land".

7. In this case, there is no question of compelling other co-sharers to pay the value of improvements effected by defendants 4 and 5 for construction of the building in the respective plots. Such situation will arise only if the property where the building stands is incapable of division without dividing the building itself. Here admittedly, there is no case that the building originally belonged to Govindan Master. It is only subsequently that the building was constructed. When it is found that building is constructed by one of the co-sharers, spending his own amount with the consent of the members except the plaintiff, and the court having allowed in equity that portion of the plot where the building is situated to the respective defendants 4 and 5, there arise no question of valuing the building and allotting a share of value of the building to the plaintiff. The fact that the plaintiff's consent was not obtained at the time of construction of the building by defendants 4 and 5, would have become material, if only that property alone was the subject matter of partition and the question of working out in equity in such circumstances did not arise. In other words, if there were only a plot available for

partition and any of the sharers have constructed a building thereon without the consent of co-sharers, then the question of partition of the building constructed may arise. However the plaintiff is entitled to a share on the land where the building is situated and she has been allotted a share on the very same land on partition. Therefore, since the land where the building is situated is allotted to the share of defendants 4 and 5 along with the building, necessarily, plaintiff will be entitled to share value of the land proportionately, but not the value of the building. Defendants 4 and 5 are therefore bound to pay the share value of the land to the plaintiff.

8. In the result, we set aside that portion of the decree allowing a share value of the building to the plaintiff. At the same time, we declare that the plaintiff is entitled for value of share in the land occupied by the building which is in equity allotted to the share of defendants 4 and 5. The preliminary decree passed subject to the above modification is confirmed.

The parties shall suffer respective costs.

The appeal is partly allowed.

P.R.RAMAN, JUDGE

V.K.MOHANAN, JUDGE.

Kvm/-

P.R.RAMAN &

V.K.MOHANAN, JJ.

A.S.No.367 OF 2001

Judgment

Dated 14-9-2007.: